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No. 93-2065

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1993

STATE OF MAINE,
Petitioner

V.

DAREN L. GRAVES,
Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT
OF THE STATE OF MAINE

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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THE TWO QUESTIONS PRESENTED IN THE PETITION ARE PROPERLY BEFORE THIS COURT

Relying on United States Supreme Court Rule 15.1, Respondent claims in his Brief in Opposition that "[t]he State of Maine has misstated or omitted facts bearing on the question of the issues that would properly be before the Court were certiorari granted." Brief in Opp. at 2. Respondent then identifies two alleged errors in the petition:

> The State of Maine in its Petition for Certiorari [1] incorrectly claims that Respondent had the opportunity to ask the complaining witness whether she sold or had been involved in the sale of a T-shirt, and further [2] incorrectly claims that Respondent failed to avail himself of the opportunity to cross-examine about it.

Brief in Opp. at 2 (footnotes omitted).

It is Respondent himself, however, who has misrepresented the record. A look at the facts in this

case demonstrates that the two questions presented in the petition are properly before this Court.

Petitioner will first address Respondent's two allegations of error in the petition. As for the first allegation, pages 7-8 and 27-28 of the petition, quoting directly from the Trial Transcript, Volume I at 30-31, demonstrate that the Trial Court did allow Defense Counsel to cross-examine Shani Orne, the complaining witness, about the T-shirt as follows: "Did you ever sell a T-shirt to so and so; yes or no?" As for the second allegation, Defense Counsel below failed to avail himself of this specific opportunity, although still cross-examining Shani about the sale of the T-shirt:

> Q Have you sold or have you been involved in the sale of any T-shirts that depict or show this incident?
>
> A No.

Q You are absolutely certain of that?

A Yes.

Q Do you know who Jerry Martin is?

A Yes.

Q Who is Jerry Martin?

A He's married to my aunt.

(T., Vol. I at 140-41).[1] Defense Counsel never asked whether Shani had ever sold a T-shirt to Jerry Martin, but instead went off on the following tack:

Q Now during the period of time that you rented the house from Mr. Graves did you have any problem paying the rent?

A Yes.

(T., Vol. I at 141), quoted in Pet. at 28-29.

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[1]References to pages in the two-volume trial transcript (M.R. Crim. P. 39(b)) shall be in parentheses as follows: (T., Vol. ____ at ____).

Since the petition, as demonstrated by the above quotations from the Trial Transcript, is faithful to the record, Respondent's claim that the petition misrepresents the facts is nothing more than a red herring to divert this Court's attention from the real issue in this case - viz., whether the Maine Supreme Court's decision, requiring that a defendant be allowed to put on a witness to supposedly impeach[2]

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[2]As noted in the petition for certiorari, "because Defense Counsel never took advantage of the opportunity to ask Shani [Orne] as to whether she had ever sold a T-shirt to Jerry Martin, there was nothing to be impeached with Jerry Martin's proposed testimony that the sale of a T-shirt had occurred. Although Shani denied that she had ever 'been involved in the sale of any T-shirts that depict or show this incident' (T., Vol. I at 140), Jerry Martin's proposed testimony would not have impeached Shani's denial because the T-shirt did not 'depict or show this incident,' i.e., the rape, but instead caricatured Respondent." Pet. at 30-31 n.7. Hence, in addition to the fact that Jerry Martin's proffered testimony failed to show (as the Trial Court recognized - T., Vol. II at 432) that Shani had an economic incentive to fabricate a rape charge against Respondent, Jerry Martin's proffered testimony had

the credibility of a prosecution witness, constitutes an unwarranted extension of the sixth amendment Confrontation Clause.

Respondent also contends that "once the trial Court heard the voir dire testimony of Jerry Martin and heard that the complaining witness had handed him a T-shirt at her home, after informing him that a fresh supply of T-shirts had recently arrived and were stored at her residence, and that the complaining witness had accepted $20.00 from Jerry Martin for the shirt while making disparaging remarks to him about the Respondent and his genitalia, at that point the trial Court was compelled to admit the testimony of Jerry Martin and to permit Respondent to cross-examine." Brief in Opp. at 15 (emphasis added). However, Respondent's assertion

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no value for impeachment purposes.

that Shani Orne told Martin that "a fresh supply of T-shirts... were stored at her residence" is nowhere supported in the record. Although Martin testified on voir dire that Shani referred to a "supply" of T-shirts (T., Vol. II at 417-18), Martin saw only the one T-shirt that was sold to him, and there was no evidence that it was Shani or Linda Orne (Shani's mother) who had the supply of T-shirts or that they did anything more than provide Jerry Martin at no profit to themselves with a T-shirt they had obtained from someone else who did have the supply of T-shirts caricaturing Respondent. In fact, the T-shirts were not stored at Shani's residence.

Moreover, Martin's voir dire testimony 1) that he paid $20 for the T-shirt or 2) that the T-shirt cost $15 and he gave Shani and Linda Orne a $20 bill and toid them to keep the change (T., Vol. II at 419, 425) does not show that Shani and Linda were in the

business or enterprise of - or profiting from - selling T-shirts. Furthermore, Martin's testimony did not establish 1) that Shani was the manufacturer of the T-shirt, 2) that Shani created the message, design, or caricature on the T-shirt, or 3) that Shani or her mother kept any of the money from the sale of the T-shirt. Indeed, Martin's testimony could not establish any one of these three points because they simply were not true. As the Trial Court recognized, "I don't see any sufficient evidence offered by this Defendant, by this witness sort of large economic scheme to make a great deal of profit off of this.... I don't know who was actually making these T-shirts. It appeared someone else was making them, not the Ornes, based on what the testimony was." (T., Vol. II at 432). Hence, contrary to the assertion of Respondent, the Trial Court was not compelled by the sixth amendment Confrontation Clause to admit the

testimony of Jerry Martin, and properly excluded Martin's testimony on evidentiary grounds.

Another example of Respondent's misrepresentation of this case is that without any citation to or quotation from the Maine Supreme Judicial Court's decision in State v. Graves, 638 A.2d 734 (Me. 1994), Respondent claims that "[t]he Maine Supreme Judicial Court correctly observed that defense counsel was subject to explicit pretrial instructions which severely restricted the scope of his cross-examination." Brief in Opp. at 10. In fact, however, the Maine Supreme Judicial Court found no such thing. Nor did Respondent present this issue to the Maine Supreme Judicial Court, particularly as Respondent apparently acquiesced in the Trial Court's limitation on Respondent's cross-examination of Shani Orne, having the following conversation with the Trial Court:

THE COURT: It seems to me as I understood what was going to be asked was a question which would appear in innocuous: Did you ever sell a T-shirt to so and so; yes or no?.

MR. DARDIS: Essentially, Your Honor, that would be the line of questioning.

THE COURT: That's what I understood.

MR. DARDIS: We weren't going to subject -- I was not going to pull the T-shirt out.

THE COURT: Did you sell -- did you ever sale a T-shirt to so and so, right, something like that?

MR. DARDIS: Something along those lines, yes. Your Honor, I will not be going beyond did she sell a T-shirt to so and so or sell T-shirts in general without offering what the T-shirt indicates.

THE COURT: Any suggestion that says anything -- any suggestion it is related to the case, a T-shirt generic.

> MR. DARDIS: That is right. She can admit that or deny she was involved in that.
>
> THE COURT: Okay. As I indicated I will allow that question based on the offer of proof which we had yesterday and today. Okay. We'll take a brief break.

(T., Vol. I at 30-31).

Because of this acquiescence, Respondent framed the issue on appeal in terms of whether the Trial Court abused its discretion under M.R. Evid. 403 by excluding the proffered "impeachment" testimony of defense witness Jerry Martin, not in terms of whether Respondent's cross-examination of Shani Orne was unduly restricted by the Trial Court. And the Maine Supreme Court found constitutional error in the exclusion of Martin's testimony, not in the scope of Respondent's cross-examination of Shani Orne. The Maine Supreme Court in fact stated:

> Graves contends, *inter alia*, that the trial court erred by... refusing to admit evidence of the complaining witness's involvement in marketing and selling a T-shirt publicizing the case. Because we agree with Graves that the trial court improperly excluded evidence concerning the T-shirt, we vacate the judgment.

Pet., App. at 2-3 (emphasis added).

Since the exclusion of the proffered testimony of Jerry Martin (a witness for Respondent) has nothing to do with whether Respondent's sixth amendment right to confront and cross-examine Shani Orne was violated, the Trial Court's exclusion of Martin's testimony for evidentiary reasons raises no constitutional issue at all. This is particularly so where Martin's proffered testimony failed to show that Shani had any economic incentive or motive for fabricating or bringing her accusation of rape against Respondent.

The Maine Supreme Court's decision requiring the admission of Martin's testimony therefore constitutes an unwarranted extension of the sixth amendment Confrontation Clause beyond the legitimate sixth amendment concern for insuring an opportunity for effective cross-examination of prosecution or adverse witnesses. Petitioner thus asks that the decision of the Maine Supreme Judicial Court be summarily reversed by this Court.

Alternatively, because the Confrontation Clause was raised sua sponte by the Maine Supreme Court and discussed for the first time in the Maine Supreme Court's written decision, so that Petitioner had no opportunity to address the scope of the Confrontation Clause and no notice to develop a record at the trial level focused specifically on this issue, the petition should be granted to make it clear that the Maine Supreme Court should have applied

the plain error test discussed in United States v. Olano, 113 S.Ct. 1770 (1993), not the harmless error test of Chapman v. California, 386 U.S. 18 (1967).

Respectfully submitted,

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